

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BRYANT TOOL & SUPPLY, INC.	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1983	:	
through November 30, 1986.	:	

DETERMINATION

In the Matter of the Petition	:
of	:
EMIL DiSIMONE,	:
OFFICER OF BRYANT TOOL & SUPPLY, INC.	:
for Revision of a Determination or for Refund	:
of Sales and Use Taxes under Articles 28 and 29	:
of the Tax Law for the Period September 1, 1983	:
through November 30, 1986.	:

Petitioner Bryant Tool & Supply, Inc., 50-29 69th Place, Woodside, New York 11377, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1983 through November 30, 1986 (File No. 807117).

Petitioner Emil DiSimone, officer of Bryant Tool & Supply, Inc., 3 Libby Drive, Glen Cove, New York 11542, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1983 through November 30, 1986 (File No. 807118).

A hearing was held before Marilyn Mann Faulkner, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York on

October 23, 1990 at 12:00 noon, with all briefs to be submitted by February 1, 1991.¹

Petitioners appeared by Albert Lemishow, C.P.A. The Division appeared by William F. Collins, Esq. (Vera Johnson, Esq., of counsel).

ISSUE

Whether the method of audit used was reasonable in calculating the amount of sales tax due.

FINDINGS OF FACT

Petitioner Bryant Tool & Supply, Inc. is a corporation involved in the wholesale and retail sale of tools and hardware supplies as well as the rental of equipment. Petitioner Emil DiSimone is the president of the corporation.²

By letter dated, October 3, 1986, the tax auditor for the Division of Taxation (Division), Monir Saleh, informed petitioner Bryant Tool & Supply, Inc. (Bryant Tool) that he would be performing a tax audit of its sales tax returns for the period September 1, 1983 through August 31, 1986.³ In that letter Mr. Saleh requested that petitioner make available to him all books and records pertaining to its sales tax liability for the period under audit including journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates and all sales

tax records. Mr. Saleh also stated in the letter that additional information might be required

¹Although the parties requested an opportunity to file a memorandum of law, they have not done so.

²Petitioners conceded that Emil DiSimone is a person required to collect tax pursuant to Tax Law § 1131(1) (Tr. 30). For the purpose of this determination, both petitioners will be referred to collectively as "petitioner".

³In the field audit report, the auditor noted that "[t]his case came down as a result of vendor's applying for N.Y. and N.J. registration which he subsequently withdrew" (Div. Exh. F).

during the course of the audit. According to Mr. Saleh's testimony at hearing, he requested "additional information" to update the audit for the quarter ending November 30, 1986 (Tr. 14).⁴

On November 20, 1986, Mr. Saleh met with Emil DiSimone for the purpose of performing the audit. At that time petitioner's accountant, Albert Lemishow, requested that Mr. Saleh use a test period for the quarter ending November 30, 1985 instead of performing a full audit for the three-year period. Thereupon, Mr. Saleh left with Mr. DiSimone a list of documents needed to perform the test period audit and scheduled the audit for December 4, 1986. Among the documents requested were sales invoices for September, October and November of 1985, resale or exemption certificates to substantiate all nontaxable sales, sales tax returns and related workpapers for September, October and November 1985, copies of the Federal income tax returns for 1983, 1984 and 1985, all purchase bills for fixed asset purchases for the period September 1, 1983 through August 31, 1986, general ledger, purchase books, cash receipts and cash disbursements for the period September 1, 1983 through August 31, 1986, and purchase and expense bills for the period January 1, 1985 through November 30, 1985.

On December 4, 1986, petitioner consented to extend the period of limitation for assessment of sales tax for the audit period until June 20, 1987.

During the audit, Mr. Saleh determined that the books and records were inadequate because some sales invoices were unnumbered and others were numbered but were not used in sequential order. The auditor concluded that there was no way to reconcile the sales invoices. Furthermore, the auditor found that there were no cash deposits.

Using the bank deposits and cash receipts, the auditor determined the amount of gross sales for the quarters of the entire audit period with the exception of the last quarter ending

⁴There is no indication in the record as to when, how or what "additional information" was requested of petitioner for this quarter; however, petitioner has not challenged the fact that such additional information was requested.

November 30, 1986. Because there was no information available for the quarter ending November 30, 1986, the auditor estimated the gross sales for the last quarter to be the same amount determined for the quarter ending November 30, 1985. The amount of gross sales found by the auditor agreed with the amount of gross sales reported in the respective sales tax returns for the entire audit period.

In determining the percentage of taxable to nontaxable sales for the audit period, the auditor first examined the documents provided for the test quarter ending November 30, 1985. He found nontaxable sales to constitute approximately 17.2% of the gross sales. These nontaxable sales were substantiated by exemption documents showing sales for resale and sales to exempt organizations. Of the gross sales, the auditor determined that 79.29% were to be taxed at the 8½% sales tax rate and 3.47% were to be taxed at the 4% sales tax rate.⁵ The auditor compared these percentages to the workpapers attached to the sales tax return for the quarter ending November 30, 1985 and noted that taxable sales were estimated as 35% and nontaxable sales at 65%. With regard to the nontaxable sales, the workpapers estimated that 5% of the gross sales constituted out-of-state sales, 50% constituted sales for resale and 10% constituted capital improvements. The auditor concluded from this comparison, that petitioner had underreported its sales tax.

In response to petitioner's accountant's claim that the use of that particular test period may have resulted in too high a percentage of taxable sales, the Division agreed to examine a different quarter from a different year. However, after examining the records for the quarter ending August 31, 1986, the auditor determined that 86.61% of the gross sales were taxable, none of which were taxable at the 4% rate. Therefore, the auditor recomputed the percentage of taxable and nontaxable sales by treating the two quarters as a six-month test period -- that is, tallying the gross sales for the two quarters and then determining the percentage of taxable and

⁵ Apparently, the auditor was shown exemption documents to support the finding that the sales should be taxed at the 4% rate.

nontaxable sales as well as the percentage of taxable sales at the 8¼% and 4% rate. The auditor determined that 83.23% of the gross sales were taxable at the 8¼% rate and 1.61% of the gross sales were taxable at the 4% rate. Applying these percentages to the gross sales for all the quarters, the auditor determined that adjusted taxable sales at the 8¼% rate were \$2,891,211.00 and adjusted taxable sales at the 4% rate were \$55,928.00. The total adjusted sales taxes were \$240,762.05. Subtracting the amount of taxes that petitioner reported and paid (\$83,121.58) from the amount of taxes due, the auditor found a tax deficiency of \$157,640.47.

By four notices of determination and demands for payment of sales and use taxes due, dated April 3, 1987, the Division assessed petitioners a total tax due for the entire audit period in the amount of \$157,640.47, with penalties of \$34,584.97 and interest of \$33,101.18, and omnibus penalties for the period June 1, 1985 through November 30, 1986 in the total amount of \$9,694.96.

Petitioners requested a conciliation conference; however, a conciliation default order was issued sustaining the statutory notices. In their petitions to the Division of Tax Appeals, petitioners alleged that the conciliation conferee denied their request, made five days prior to the conference date, for an adjournment due to illness.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner's representative alleged at the hearing that Bryant Tool was audited as a result of one sale to a New Jersey customer because New York State had a policy of auditing "all companies who collect sales tax from New Jersey customers" (Tr. 44). He claimed that Bryant Tool should never have been audited based on "one sale to New Jersey in [its] entire career" (Tr. 44). The second argument is a bit unclear; however, petitioner's representative appeared to argue that Bryant Tool was entitled to estimate the percentage of taxable and nontaxable sales in the sales tax return for the quarter ending November 30, 1985 based upon a prior test period (Tr. 31-37, 44-46).

The Division argued at the hearing that because petitioner's books and records were inadequate, the Division had the right, pursuant to Tax Law § 1138(a), to estimate the sales tax

liability based on a test period. The Division also argued that petitioner failed to carry its burden of proof to overcome the reasonableness of the assessment.

CONCLUSIONS OF LAW

A. Under Tax Law § 1135(a)(1), "[e]very person required to collect tax shall keep records of every sale...in such form as the commissioner of taxation and finance may by regulation require." These records must be kept in a manner suitable to determine the correct amount of tax due and must be available for the Division's inspection upon request (Tax Law § 1135[d]; 20 NYCRR 533.2[a][2]). The regulations provide that among the sales records required to be maintained are true copies of each "sales slip, invoice, receipt, contract, statement or other memorandum of sale; ...cash register tape and any other original sales document" (20 NYCRR 533.2[b][1]). When the taxpayer's records are incomplete and unreliable for determining accurate sales, the Division may estimate the tax owing from such information as may be available (Tax Law § 1138[a][1]). In such circumstances, the Division may perform a test period audit (Matter of Licata v. Chu, 64 NY2d 873, 487 NYS2d 552; Matter of Sloan's Supermarkets, Inc. v. Chu, 140 AD2d 794, 527 NYS2d 889; Matter of Ace Provision & Luncheonette Supply, Inc. v. Chu, 135 AD2d 1070; 523 NYS2d 208). When conducting the audit, the Division must select a method reasonably calculated to reflect the amount of the tax due (Matter of Urban Liquors, Inc. v. State Tax Commission, 90 AD2d 576, 456 NYS2d 138, 139, citing Matter of W. T. Grant Co. v. Joseph, 2 NY2d 196, 206, 159 NYS2d 150, cert denied 355 US 869). Petitioner then has the burden of demonstrating by clear and convincing evidence that the method of audit or amount of the tax assessed was erroneous (id.).

The auditor correctly determined that the sales invoices provided were unreliable for determining the amount of tax owing. One type of sales invoices was unnumbered and the second type, although numbered, was not in sequential order. Furthermore, there is uncontroverted evidence that petitioner requested that a test period audit be performed. At the commencement of the audit, the auditor requested that all books and records be made available to him for the entire audit period. It was only after petitioner's request for a test period audit

that the auditor restricted his examination to the quarter ending November 30, 1985 with regard to determining the percentage of taxable and nontaxable sales. In fact, when petitioner was dissatisfied with the results of the audit of this test period, it requested that a second quarter be audited. The auditor therefore performed an audit of another quarter and combined the results of the audits for the two test periods.

The auditor's method in determining the total tax liability was reasonable under the circumstances (see, Matter of Sloan's Supermarket, Inc. v. Chu, supra; Matter of Ace Provision & Luncheonette Supply, Inc. v. Chu, supra). The Division's auditor used the bank deposits and cash receipts to determine gross sales for each quarter of the entire audit period. These amounts corresponded with the amount of gross sales reported in the sales tax returns. The auditor then determined the percentage of taxable and nontaxable sales in the two quarters constituting the test period based upon the exemption documents available. This percentage was then applied to the gross sales of each quarter for the audit period.

B. Petitioner does not challenge the method used by the auditor in determining the sales tax assessed for the audit period. Petitioner's only two arguments appear to be that (1) the audit should not have been performed in the first instance based Bryant Tool's sale to a New Jersey customer, and (2) that Bryant Tool was entitled in its sales tax return to estimate the amount of tax due in the quarter ending November 30, 1985.

There is no merit to petitioner's contentions. First, the reason for petitioner's audit is irrelevant and petitioner has not provided any legal reasoning or authority to challenge the audit on this basis. Secondly, although advised during the course of the hearing, petitioner presented no evidence in the form of documentation or testimony to support or justify the amount of sales tax reported on the sales tax return for the quarter ending November 30, 1985. In short, petitioner has not met its burden of demonstrating that the method of audit or amount of tax assessed was erroneous.

C. The petitions of Bryant Tool & Supply, Inc. and Emil DiSimone are denied and the four notices of determination and demands for payment of sales and use taxes due dated April 3,

1987 are sustained.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE